Docket No. COLC-2022-2
Internet Archive's Response to the
U.S. Copyright Office's Notice of Inquiry on
Standard Technical Measures and Section 512

This statement is provided on behalf of the Internet Archive, a 501(c)(3) non-profit library. Like other libraries, Internet Archive works to expand access to knowledge by collecting, preserving, and providing public access to a variety of physical and digital materials. The Internet Archive is based in San Francisco, California, but most of our patrons visit our collections online at archive.org,[1]

The Internet Archive's most well-known collection is the Wayback Machine. Beginning in the 1990's and continuing to this day, the Wayback Machine is creating an archive of the world wide web. Like other archival collections, with the Wayback Machine we both preserve an important piece of cultural heritage (in this case, the web itself) and provide access to it for our patrons. Like all libraries, these twin goals—preservation and access—underlie much of what we do.[2]

Beyond the Wayback Machine, the Internet Archive preserves and provides access to a wide array of physical and digital materials. Many of these materials are in digital formats and uploaded by third-party patrons of the Internet Archive: librarians, archivists, enthusiasts, and others. It is only through their work, motivated not by financial gain but by service to the public interest, that much of our digital heritage is archived and preserved today.

Thus, the work of a library today often involves the upload, hosting, and delivery of various kinds of materials, including from library partners as well as citizen archivists. Section 512 of the Digital Millennium Copyright Act is therefore of crucial importance to libraries and their patrons, including the Internet Archive, and to our shared mission of preserving and providing access to knowledge. In the circumstances, we have included below some initial comments in response to the identified questions raised by the U.S. Copyright Office's April 27, 2022 Notification of Inquiry on Standard Technical Measures and Section 512.

[1] Archive.org is one of the world's most visited websites. *See, e.g.,* https://moz.com/top500.
[2] *See* https://archive.org/about/ (describing Internet Archive's collections).

1. *Are there existing technologies that meet the current statutory definition of STMs in section 512(i)? If yes, please identify. If no, what aspects of the statutory definition do existing technologies fail to meet?*

No, there are, as a general matter, no existing technologies that meet the statutory definition of standard technical measures set forth in Section 512(i).[3] In one respect, this is due to the nature of Section 512(i) itself—it is not a government technology mandate, but rather a condition on a limitation of liability to be litigated (if at all) in individual cases. But it is also the case that no technical measures have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standard process that are available to any person on reasonable and nondiscriminatory terms and do not impose substantial costs on service providers or substantial burdens on their systems or networks.

2. *What has hindered the adoption of existing technologies as STMs? Are there solutions that could address those hindrances?*

Existing technologies which purport to address certain aspects of the definition of standard technical measures in Section 512(i)(2)—such as to identify copyrighted works—are burdensome, costly, ineffective, and, if used to impose blanket takedowns, likely to impinge on free expression.[4]

We ourselves have been on the receiving end of many automated notice systems and have found the output of these systems is often incomplete or wrong. Common problems include claiming ownership of works in the public domain, claiming ownership of works clearly not owned by those sending the notice, and claiming speech clearly protected by the fair use doctrine as infringement (such as a review or lesson plan).[5]

In the circumstances, it should be no surprise that a broad consensus has not formed around the adoption of such technology in the manner described in Section 512(i).

3. *Process under the current statute: . . . (d) Courts: What role, if any, do or should courts play in determining whether a particular technology qualifies as an STM under section 512(i)?. . . .*[6]

Section 512(i) is a provision to be interpreted by the courts in individual copyright infringement cases. That is because it is, by its express terms, a "condition" under which a litigant may be "eligibl[e]" for a "limitation[] on liability." It is not a mandate to private industry, or anyone else, to develop a certain kind of technology or to

[3] *See* U.S. Copyright Office, Section 512 of Title 17 (May 21, 2020) at 67 (noting that "more than twenty years after passage of the DMCA . . . not a single technology has been designated a 'standard technical measure' under section 512(i)").
[4] *See, e.g.,* https://cdt.org/insights/why-filtering-is-not-the-solution/
[5] https://archive.org/details/InternetArchiveDMCA512Comments/page/n3/mode/2up
[6] This section is also responsive to question 11.

"facilitate the identification and adoption" of any particular kind of technology. It is an element that may be put in dispute in a particular copyright infringement case; nothing more, nothing less.

Thus, questions regarding Section 512(i) necessarily take place in federal court, in the context of specific claims of copyright infringement against which the DMCA safe harbor may preclude individual liability. It would be for the courts to decide, in each particular instance and with the benefit of the adversarial process, whether a service provider had accommodated and not interfered with a standard technical measure pursuant to Section 512(i) and the definitions set forth therein.

The Copyright Act neither envisions nor authorizes a separate process, whether "formal," "informal," or "regulatory" in nature, for "adoption of an STM" or otherwise with respect to Section 512(i). Nor would any such process be binding on an Article III court in the context of a specific case or controversy involving Section 512(i).

4. *International Organizations: Could technologies developed or used by international organizations or entities become STMs for purposes of section 512(i)? If so, through what process?*

As outlined in response to question 3, above, questions regarding Section 512(i) necessarily take place in the context of specific claims of copyright infringement against which the DMCA safe harbor is raised. It would be for the court to decide in each particular instance whether the service provider in question had accommodated and not interfered with a standard technical measure pursuant to Section 512(i) and the definitions set forth therein. To be sure, either party in such a lawsuit could attempt to cite to the activities of international organizations or entities in support of their position. Beyond this, international organizations play no role.

There is reason to doubt that the activities of an international organization or entity would be particularly relevant in such a case. That is in part because of the unique legal context of the United States, its strong protection for free expression, the fair use doctrine, and the specific requirements of Section 512. For example, there will no doubt continue to be international activity relating to Article 17 of the European Union's Copyright in the Digital Single Market Directive and its purported "upload filter" requirement.[7] But that activity takes place against the particular legal context

[7] *See* Directive 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market

in Europe and their own forms of protection for individual rights.[8] It cannot define a standard technical measure under Section 512(i).

7. Costs and burdens: Under section 512(i)(2)(C), an STM must not "impose substantial costs on service providers or substantial burdens on their systems or networks." How should the substantiality of costs and burdens on internet service providers be evaluated? Should this evaluation differ based on variations in providers' sizes and functions?

Section 512(i)(2)(C) excludes from the definition of standard technical measures any technology which would impose substantial costs on service providers or substantial burdens on their systems or networks. Neither this provision, nor the relevant definition of service provider, admits of a standard technical measure which would impose substantial burdens and costs on libraries, non-profits, or small and mid-size companies.[9]

10. Obligations: Currently, section 512(i)(1) conditions the safe harbors established in section 512 on an internet service provider accommodating and not interfering with STMs. (a) Is the loss of section 512 safe harbors an appropriate remedy for interfering with or failing to accommodate STMs?

Section 512(i) is a part of a broader statutory scheme that limits potential liability for copyright infringement. It is meant to be considered in the context of a specific claim of copyright infringement, and the DMCA expressly states that the failure to qualify for any such limitation on liability "shall not bear adversely" on the litigant in otherwise disputing the claim–let alone other claims.[10] In the circumstances, there is no appropriate remedy beyond loss of the DMCA safe harbor in a particular case.

Respectfully submitted,

Internet Archive

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[8] *See, e.g., Republic of Poland v. European Parliament and Council of the European Union*, Case C-401/19 (April 26, 2022), *available at* https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0401 (noting that online service providers (as defined in the directive) "cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright")

[9] This is what one commonly-suggested approach would do. *See* https://copybuzz.com/analysis/things-money-cant-buy/

[10] *See* 17 U.S.C. 512(l).